IN THE HIGH COURT OF JUDICATURE OF BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 747 of 1997

Shri Milind M. Pathak .. Petitioner

versus

The Principal, A.V. College of Arts, A.M.College of Commerce & ESA College of Science Vasai Road, Thane & ors. .. Respondents

...

Mr.R.P. Behere for the petitioner.

Ms.S.D. Khot i/b Shri Niteen Pradhan for respondent nos.1 and 2.

Mr.R.A. Rodriques for respondent no.3.

Ms.S.S. Bhende, AGP for respondent no.4.

Mr.N.M. Ganguli for respondent no.5.

CORAM : S.B. MHASE AND

D.G. KARNIK, JJ

DATED : 24th January 2005.

P.C.:

1. Heard the learned counsel appearing for the

parties.

2. By this petition, the petitioner seeks a declaration that the petitioner be deemed to have been confirmed to the post of a Lecturer in Zoology with effect from 28th June 1993 and other incidental reliefs.

3. The facts are mostly undisputed and lie in a narrow compos. They are stated below :-

. The respondent no.1 is the Principal of a E.S.V. College of Science. The respondent no.2 is the Secretary of the Society which runs the college. Respondent no.3 is the University and respondent no.4 is State of Maharashtra. In the year 1991, the respondent no.1 issued an advertisement for appointment of a lecturer in Zoology. The post was reserved for a Schedule Tribe candidate. It was mentioned in the advertisement that in the event an eligible candidate from a scheduled tribe was not available for appointment, a person from an open category would be appointed for the post. It appears that no suitable candidate belonging to a Schedule Tribe candidate was available for appointment. The petitioner who was an

open category candidate and who had applied for the said post was therefore selected and appointed as a lecturer in Zoology. The appointment was temporary and only for the academic year 1991-92. Accordingly, a letter of appointment was issued to the petitioner appointing him from 1st July 1991 to 21st April 1991. For the next academic year, again an advertisement was issued for the reserved post of lecturer in Zoology. As a candidate of Scheduled tribe was not available, the petitioner was again appointed for the next year i.e. 1st July 1992 to 24th April 1993. Similar procedure was followed for the next three years and the petitioner was every time appointed temporarily to the said post in for the academic years 1993-94, 1994-95 and 1995-96. The last appointment of the petitioner came to an end on 24th April 1996. A fresh advertisement was issued in the year 1996-97 for the reserved post of a lecturer in Zoology. Again for the year 1996-97 also, a candidate belonging to a schedule tribe was not available. It however, appears that relying upon a circular of the Government dated 5th December 1994, reservation was interchanged from schedule tribe to a scheduled caste category. The respondent no.5 who belongs to the schedule caste and was qualified was selected to the post as there was no

other applicant belonging to a schedule tribe. An appointment order was accordingly issued to the respondent no.5. That appointment is impugned in this petition; and the petitioner claims that he be deemed to have been confirmed in the post of the lecturer in Zoology with effect from 28th June 1993.

3. In our view, the petition must fail for reasons more than one. Firstly, every year the petitioner was issued a temporary appointment letter only for an academic year commencing from 1st July of the year and ending on 31st April of the next calendar year. Every year, a fresh advertisement was issued advertising the post. The petitioner not only accepted the expiry of the period of his appointment every year by 30th April but also participated in the fresh appointment process and offered himself as a candidate. Even for the academic year 1996-97, the petitioner offered himself as a candidate to the post of a lecturer in Zoology and did not object to the advertisement. After having undergone the selection process, the petitioner cannot challenge the appointment of respondent no.5 and claim that he was a permanent employee. If he was a permanent employee since 1993, he should not be participated in the

selection process for each of the years thereafter. The petitioner cannot approbate and reprobate.

4. We have perused the Government resolution dated 5th December 1994. In the said Government resolution, it is clearly specified that whenever any post is reserved for a candidate belonging to a backward category and a candidate of that backward category is not available for appointment for that year, a person from an open category may be appointed to that post temporarily for one year. And at the end of the year, a fresh advertisement should be issued for filling up of the post. If in the second year also, a person belonging to the category for which the post is reserved is not available for appointment, then the post would be filled in by appointment of an open category candidate. The person who was appointed for the previous year may be appointed without interview, if he was available and his performance was satisfactory. At the end of second year also, the post is to be re-advertised and similar selection process is to be followed. Similar exercise should continue till the expiry of fifth year from the date of initial appointment. At the end of five years, if a candidate

from a category for which the post is reserved is not available, then the reservation should be interchanged with other backward category as specified in the Government resolution and the person from the interchanged category should be appointed to the post. If a person of other backward class to which the post is interchangeable is also not available in the sixth then only a person of the open category, can be appointed and the process of seeking of the Government's approval for de-reservation of the post should be stated after the end of the sixth year. In the present case, at the end of five years exercise of interchanging of the reservation was undertaken. The post was initially reserved for a scheduled tribe candidate and as a scheduled tribe candidate was not available, reservation was interchanged for a scheduled caste candidate. The respondent belongs to a scheduled caste and was eligible for the said post. Therefore, respondent no.5 was appointed to the said post. The appointment of respondent no.5 was thus made in accordance with the Government resolution. The petitioner cannot claim that the reservation had lapsed in the year 1993 itself or that he was deemed to have been confirmed in the 2nd year itself i.e. in the year 1993. The post remained to be reserved for a schedule

tribe candidate for the first five years and became available for a schedule caste candidate at the end of five years. The petitioner who does not belong to a schedule caste or schedule tribe but belongs to an open category, therefore, cannot claim confirmation in the said post.

5. For these reasons, there is no merit in the petition which is hereby dismissed. Rule is discharged with no order as to costs.

(D.G. KARNIK, J) **(S.B. MHASE, J)**